

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

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CHANCERY COURTHOUSE
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RE: *BBD Beach, LLC v. Bayberry Dunes Association, Robert Gould, Bob Paoli,
Michael Sapir, and Philip Wisler*
C.A. No. 2021-0429-PWG

Dear Counsel:

Pending before me is a motion for judgment on the pleadings filed by a homeowners' association in a matter where a property owner alleges that the association violated the community's deed restrictions when it rejected the property owner's proposal to build a swimming pool. The property owner asserts that the deed restrictions do not apply to the proposed pool and the association's actions were unreasonable. In response, the association argues that the deed restrictions do apply to the property owner's proposal and the association's architectural review committee acted reasonably in denying the proposal. I

conclude that the deed restrictions provide enforceable standards that apply to the pool, and also that material factual issues remain about the architectural review committee's decision. Therefore, I recommend that the Court deny the homeowners' association's motion for judgment on the pleadings. This is a final report.

I. Background

On May 14, 2021, Plaintiff BBD Beach, LLC ("BBD") filed a complaint against Defendants Bayberry Dunes Association, Robert Gould, Bob Paoli, Michael Sapir, and Philip Wisler (collectively, the "Association") asserting that the Association wrongfully denied the approval for construction of a swimming pool ("Swimming Pool") on BBD's property ("Property"), which is Lot 35 in the Bayberry Dunes community ("Bayberry Dunes"), under the Bayberry Dunes Restrictive Covenants ("Restrictive Covenants").¹ On September 13, 2021, BBD filed an amended complaint ("Amended Complaint") before serving the Association.²

On July 14, 2020, a member of BBD sent an email to the Association's Architectural Review Committee ("ARC"), advising the ARC of BBD's intention

¹ Docket Item ("D.I.") 1; *see also id.*, Ex. B ("Original and All Amendments to Restrictive Covenants, Reservations and Remedial Clauses of Bayberry Dunes," recorded on January 15, 2014). BBD's members are three siblings. D.I. 5, ¶ 4. BBD purchased the Property on August 28, 2013. *Id.*, ¶ 4, Ex. A.

to construct the Swimming Pool on the Property.³ On July 15, 2020, Phil Wisler responded on behalf of the ARC that the Swimming Pool was located within the setbacks established by the Restrictive Covenants and that the Swimming Pool “cannot be considered/approved” by the ARC.⁴ A series of emails between the ARC and BBD followed on July 15 and 16, 2020 about the Swimming Pool.⁵ On September 7, 2020, BBD submitted plans (“Plans”) by email to the ARC seeking “preliminary approval” for the Swimming Pool.⁶ On September 10, 2020, the ARC rejected the Swimming Pool (“Denial”), noting:

The ARC has concluded that maintaining the harmony of the community and its serene nature is a priority for our residents. It is the opinion of the ARC that substantial recreational facilities, such as swimming pools, are not consistent with this priority and would create an incremental negative impact on surrounding neighbors and the community.⁷

On February 12, 2021, BBD, through counsel, requested that the Association’s board of directors (“Board”) reconsider the Denial, arguing that the Restrictive

² D.I. 5.

³ *Id.*, ¶ 8; *id.*, Ex. C.

⁴ *Id.*, Ex. C.

⁵ *Id.*, Exs. D, E.

⁶ *Id.*, ¶ 12. The email contained an “outline and overview” of the Swimming Pool “along with details in the attached document.” *Id.*, Ex. F (September 7, 2020 email describing the Plans, without attachment); D.I. 13, Ex. 1 (Attachment to the September 7, 2020 email).

⁷ D.I. 5, Ex. G.

Covenants are “old, very broad and probably not enforceable in this instance.”⁸

The Board responded, on February 23, 2021, that they were “satisfied that the ARC acted within the scope of its authority.”⁹

In the Amended Complaint, BBD asks the Court to declare that the Denial was improper under the Restrictive Covenants and award attorney’s fees under 10 *Del. C.* § 348.¹⁰ On October 6, 2021, the Association filed an answer denying BBD’s claims, seeking judgment in its favor, and requesting attorney’s fees.¹¹

On November 12, 2021, the Association filed a motion for judgment on the pleadings (“Motion”), contending that the ARC properly rejected the Swimming Pool under the Restrictive Covenants, with BBD responding, on December 17, 2021, that the ARC’s rejection was improper.¹² The Motion is fully briefed.

II. Standard of Review

“A motion for judgment on the pleadings may be granted only where no material issue of fact exists and the movant is entitled to judgment as a matter of law.”¹³ “In determining a motion under Court of Chancery Rule 12(c) for

⁸ *Id.*, Ex. H.

⁹ *Id.*, Ex. H.

¹⁰ *Id.*, at 6.

¹¹ D.I. 13.

¹² D.I. 14; D.I. 15; D.I. 17; D.I. 18.

¹³ *Desert Equities v. Morgan Stanley Leveraged Equity Fund II, LP*, 624 A.2d 1199, 1205 (Del. 1993).

judgment on the pleadings, a trial court is required to view the facts pleaded and the inferences drawn from such facts in a light most favorable to the non-moving party.”¹⁴ “A trial court need not blindly accept as true all allegations, nor must it draw all inferences from them in the non-moving party’s favor unless they are reasonable inferences.”¹⁵ “On a Rule 12(c) motion, the Court may consider documents integral to the pleadings, including documents incorporated by reference and exhibits attached to the pleadings, and facts subject to judicial notice.”¹⁶

III. Analysis

A. The Parties’ Contentions

The Association argues that the ARC properly rejected the Plans because the Swimming Pool is a “structure” and the Plans did not comply with relevant setback requirements in the Restrictive Covenants that apply to structures, and the Plans failed to meet specificity requirements in the Restrictive Covenants.¹⁷ BBD contends that the Swimming Pool is not addressed in the Restrictive Covenants and Sussex County zoning ordinances (“Zoning Ordinances”), rather than the

¹⁴ *Id.* (citations omitted).

¹⁵ *West Coast Mgmt. & Capital, LLC v. Carrier Access Corp.*, 914 A.2d 636, 641 (Del. Ch. 2006) (cleaned up).

¹⁶ *Jimenez v. Palacios*, 250 A.3d 814, 827 (Del. Ch. 2019), *as revised* (Aug. 12, 2019) (citations omitted), *aff’d*, 237 A.3d 68 (Del. 2020) (TABLE).

¹⁷ D.I. 15, at 8-12.

Restrictive Covenants, regulate swimming pools.¹⁸ Alternatively, BBD alleges that, if the Restrictive Covenants are ambiguous, extrinsic evidence shows that they are unenforceable.¹⁹ Finally, BBD argues that the Plans do not lack the specificity required by the Restrictive Covenants.²⁰

B. Legal Standards

Restrictive covenants, or deed restrictions, requiring approval of an association, or its architectural committee, before a property owner can erect a structure on her property, are enforceable if they articulate “a clear, precise and fixed standard the reviewing body must apply.”²¹ However, such restrictions “are viewed with suspicion due to the tendency of such review to be arbitrary, capricious and therefore unreasonable,” and are strictly construed.²² If a restriction is “vague, imprecise, or unclear, the grant of authority normally is not

¹⁸ D.I. 17, at 6-9.

¹⁹ *Id.*, at 10-12.

²⁰ *Id.*, at 13-16.

²¹ *Benner v. Council of Narrows Ass’n of Owners*, 2014 WL 7269740, at *1 (Del. Ch. Dec. 22, 2014), *adopted*, 2015 WL 1206724 (Del. Ch. Mar. 16, 2015); *see also Lawhon v. Winding Ridge Homeowners Ass’n, Inc.* [hereinafter “*Lawhon*”], 2008 WL 5459246, at *5 (Del. Ch. Dec. 31, 2008); *Seabreak Homeowners Ass’n, Inc. v. Gresser* [hereinafter “*Seabreak*”], 517 A.2d 263, 269 (Del. Ch. 1986), *aff’d*, 538 A.2d 1113 (Del. 1988) (TABLE).

²² *Benner*, 2014 WL 7269740, at *7; *see also Tusi v. Mruz*, 2002 WL 31499312, at *3 (Del. Ch. Oct. 31, 2002) (“because [architectural review Restrictive Covenants] restrict the ‘free use of property,’ restrictive covenants must be strictly construed”).

enforceable.”²³ And, in reviewing requests under the restrictions, an association or its architectural committee cannot unreasonably withhold approval, and “any doubts as to [the architectural review function’s] reasonableness must be resolved in favor of the landowners.”²⁴ Although restrictions “based on abstract aesthetic desirability are impermissible,”²⁵ deed restrictions allowing for denial based on lack of visual harmony “can be upheld if there is a reasoned, non-arbitrary basis for the reviewing authority to assess whether a proposal would disrupt the visual harmony of the affected community.”²⁶

Interpreting deed restrictions is a matter of contract interpretation and provisions are construed by determining original intent from the plain and ordinary meaning of the words.²⁷ “The proper construction of [the operation of] a contract ... is purely a question of law, as is the proper interpretation of specific contractual language.”²⁸ Under Delaware caselaw, contracts are read “as a whole ..., so as not

²³ *Benner*, 2014 WL 7269740, at *7; *Seabreak*, 517 A.2d at 269.

²⁴ *Seabreak*, 517 A.2d at 268 (citation omitted); *see also Dolan v. Villages of Clearwater Homeowner’s Ass’n, Inc.*, 2005 WL 2810724, at *4 (Del. Ch. Oct. 21, 2005).

²⁵ *Lawhon*, 2008 WL 5459246, at *5.

²⁶ *Dolan*, 2005 WL 2810724, at *4.

²⁷ *See New Castle Cty. v. Pike Creek Recreational Servs., LLC*, 82 A.3d 731, 747 (Del. Ch. 2013), *aff’d*, 105 A.3d 990 (Del. 2014) (TABLE); *Benner*, 2014 WL 7269740, at *8; *Pues v. Simpson*, 2009 WL 1451853, at *2 (Del. Ch. May 26, 2009).

²⁸ *Wenske v. Blue Bell Creameries, Inc.*, 2018 WL 3337531, at *10 (Del. Ch. July 6, 2018) (internal quotation marks and citations omitted) (alterations in original), *reh’g denied*, 2018 WL 5994971 (Del. Ch. Nov. 13, 2018).

to render any part of the contract mere surplusage” or to “render a provision or term ‘meaningless or illusory.’”²⁹ The Court “ascribes to the words their common or ordinary meaning, and interprets them as would an objectively reasonable third-party observer.”³⁰ It is well-established that Delaware courts can look to dictionaries for assistance in determining the intended meaning of contract terms.³¹ Deed restrictions are “construed in accordance with their plain meaning in favor of a grantee [such as a homeowner] and against a grantor or the one who enforces in his place [such as a homeowners’ association].”³²

C. Do the Restrictive Covenants Provide Clear, Precise and Fixed Standards for the ARC to Apply?

First, I consider whether the Restrictive Covenants provide clear, precise and fixed standards for the ARC to apply. I evaluate each standard in the Restrictive Covenants, in turn, to determine whether it is clear, precise and fixed and,

²⁹ *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (citations omitted); see also *Ray Beyond Corp. v. Trimaran Fund Mgmt., LLC*, 2019 WL 366614, at *5 (Del. Ch. Jan. 29, 2019).

³⁰ *Lawhon*, 2008 WL 5459246, at *6 (Del. Ch. Dec. 31, 2008) (internal quotation marks and citations omitted).

³¹ See *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006) (“dictionaries are the customary reference source that a reasonable person in the position of a party to a contract would use to ascertain the ordinary meaning of words not defined in the contract”).

³² *Serv. Corp. of Westover Hills v. Guzzetta*, 2009 WL 5214876, at *3 (Del. Ch. Dec. 22, 2009) (internal quotation marks and citations omitted).

therefore, enforceable. “Fixed standards constrain subjectivity and promote even-handed application,” and are upheld as valid.³³

Under the Restrictive Covenants, the ARC is granted the power of architectural review,³⁴ and property owners must submit “complete and comprehensive plans and specifications showing the nature, kind, shape, height, materials, floor plans, exterior architectural scheme, location and frontage on the lot, approximate cost of such building, structure or other erection, and the grading and landscaping of the lot” to the ARC prior to undertaking any construction on their property in Bayberry Dunes.³⁵ This requirement applies to construction of any “building, structure, fence, wall or other erection.”³⁶

At issue is the meaning of “structure” in this context. The Association argues that the Swimming Pool is a “structure” under the Restrictive Covenants.³⁷ In contrast, BBD claims the Swimming Pool is not a “structure” since the Restrictive Covenants identify only main dwellings and accessory buildings as “structures.”³⁸

³³ *Lawhon*, 2008 WL 5459246, at *5.

³⁴ D.I. 5, Ex. B, § 7 (“The [ARC] is hereby vested with the power to control all buildings, structure or improvements to be placed upon any lot ... within Bayberry Dunes.”).

³⁵ *Id.*, Ex. B, § 8.

³⁶ *Id.*

³⁷ D.I. 15, at 11.

³⁸ D.I. 17, at 11-12.

The Restrictive Covenants do not define “structure.” They specifically address main dwellings and accessory buildings as “buildings,” and list “buildings” and “structures” separately for purposes of architectural review.³⁹ If a contractual term, like “structure,” is undefined, “the interpreting court may consult the dictionary, if that is deemed useful, when determining the term’s plain meaning.”⁴⁰ I consult the dictionary definition of “structures” to determine the ordinary and usual meaning of that word. A “structure” is defined as “something (such as a building) that is constructed”⁴¹ or “something built, such as a building or a bridge.”⁴² A “swimming pool” is defined as “a tank (as of concrete or plastic) made for swimming”⁴³ or “an artificial area of water for swimming.”⁴⁴ I conclude that a swimming pool, which is a tank or artificial area of water constructed on a

³⁹ D.I. 5, Ex. B, § 5 (referring to the “height of any building” and the “use of any such dwelling building” related to main dwellings); *id.*, § 6 (addressing “accessory buildings”); *id.*, §§ 7, 8, 9.

⁴⁰ *Wenske v. Blue Bell Creameries, Inc.*, 2018 WL 3337531, at *10 (Del. Ch. July 6, 2018), *reargument denied*, 2018 WL 5994971 (Del. Ch. Nov. 13, 2018); *see also Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006).

⁴¹ *Structure*, Merriam-Webster Dictionary, <https://www.merriamwebster.com/dictionary/structure> (last visited Mar. 10, 2022).

⁴² *Structure*, Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/structure> (last visited Mar. 10, 2022).

⁴³ *Swimming Pool*, Merriam-Webster’s Dictionary, <https://www.merriam-webster.com/dictionary/swimming%20pool> (last visited Mar. 10, 2022).

⁴⁴ *Swimming Pool*, Cambridge Dictionary, <https://dictionary.cambridge.org/us/dictionary/english/swimming-pool> (last visited Mar. 10, 2022).

property, is a “structure” under the Restrictive Covenants.⁴⁵ Therefore, this restrictive covenant provides clear, precise and fixed standards for submission requirements for property owners seeking architectural review by the ARC.⁴⁶

In addition, the Restrictive Covenants grant the ARC broad authority to review proposals submitted:

The [ARC] shall have the right to refuse to approve any such plans or specifications, grading or landscaping plans or changes, which are not suitable or desirable in the sole discretion of the [ARC] for purely aesthetic or other reasons; and in passing upon such plans and specifications, grading and landscaping plans or changes, the [ARC] shall have the right to take into consideration the suitability of the proposed building or improvements or erections and/or the materials of which the building or other improvements or erections are to be built, and the site upon which it is proposed to be built, the harmony

⁴⁵ To establish the meaning of “structures”, the Association cites to the Zoning Ordinances, which specifically defines “structures” as including “swimming pools.” D.I. 15, at 11. Although my interpretation of the plain meaning of “structures” in the Restrictive Covenants (to include the Swimming Pool) is consistent with the definition in the Zoning Ordinances, I do not rely on the Zoning Ordinances for that purpose. “[A] contract may incorporate by reference provisions contained in some other instrument. As long as a contract refers to another instrument and makes the conditions of such other instrument a part of it, the two will be interpreted together as the agreement of the parties.” *In re National Collegiate Student Loan Tr. Litig.*, 251 A.3d 116, 151 (Del. Ch. 2020) (internal quotation marks and citations omitted). The Restrictive Covenants provide that “[t]he Zoning Ordinance of Sussex County governs building setback lines, building heights, building areas and land use in general and, to the extent those requirements are more restrictive than other provisions herein, the Zoning Ordinance must govern.” D.I. 5, Ex. B, § 2. The Restrictive Covenants, however, do not adopt the definitions in the Zoning Ordinances.

⁴⁶ See *Lawhon*, 2008 WL 5459246, at *5 (Del. Ch. Dec. 31, 2008) (“The command that a prospective land purchaser be given adequate notice of a burdensome restriction necessarily includes notice of what is restricted. Adequate notice means communicating the demands of compliance; whether that be a 10-foot-setback or a certain architectural style.”).

thereof with the surroundings, and the effect of such improvements, additions, alterations or changed use, as planned, on the outlook from the adjacent or neighboring property, and any and all factors which, in the opinion, would affect the desirability or suitability of such proposed improvements, erection, alterations or changes.⁴⁷

This section provides four standards for the ARC to apply: (1) “suitable or desirable in the sole discretion of the [ARC] for purely aesthetic or other reasons” (“Aesthetic Standard”); (2) “suitability of the proposed building or improvements or erections and/or the materials of which the building or other improvements or erections are to be built, and the site upon which it is proposed to be built” (“Suitability Standard”); (3) “the harmony thereof with the surroundings” (“Harmony Standard”); and (4) “the outlook from the adjacent or neighboring property” (“Outlook Standard”).

The Restrictive Covenants also establish setback lines of 30 feet for the front yard, 18 feet for the rear yard, and 10 feet for the side yard (“Setback Covenants”), that apply to “buildings or structures or part thereof.”⁴⁸ And, “[t]he building area of any numbered lot located in Bayberry Dunes shall not exceed forty-five percent (45%) of the entire land area of such numbered lot” (“Building Area Covenant”).⁴⁹

⁴⁷ D.I. 5, Ex. B, § 9.

⁴⁸ *Id.*, Ex. B, § 13. The Restrictive Covenants also provide that the “rear lot lines of Lot ... 35 shall form the centerline of a ten (10) foot wide landscaping easement.” *Id.*, Ex. B, § 28. Neither party has addressed the impact of the landscaping easement in their briefing, and I do not comment upon it at this point.

⁴⁹ *Id.*, Ex. B, § 11.

I consider the Aesthetic Standard in the Restrictive Covenants and determine it is not valid. “[R]estrictions based on abstract aesthetic desirability are impermissible ... [because an] individual’s, or a committee’s, opinion of what is tasteful does not constitute an objectively fair and reasonably ascertainable standard.”⁵⁰ Architectural review decisions, however, “may be influenced by aesthetic considerations while still subject to objective standards.”⁵¹

Weighing the Suitability Standard, I find it is generally unenforceable because “suitability” cannot be assessed objectively.⁵² I also consider that courts have generally held standards based upon “outlook” of neighboring properties in deed restrictions to be unenforceable because the term “‘outlook’ has no built-in, objective standards that would enable it to be applied in an evenhanded manner or to be used as a guideline by lot owners in designing their residences.”⁵³ Thus, the Outlook Standard provides “no built-in, objective standards” for the ARC to apply so it is also unenforceable.

⁵⁰ *Lawhon*, 2008 WL 5459246, at *5; *see also Seabreak*, 517 A.2d 263, 269 (Del. Ch. 1986), *aff’d*, 538 A.2d 1113 (Del. 1988) (TABLE).

⁵¹ *Lawhon*, 2008 WL 5459246, at *5.

⁵² *See Point Farm Homeowner’s Ass’n, Inc. v. Evans*, 1993 WL 257404, at *3 (Del. Ch. June 28, 1993) (holding that a provision giving the architectural review committee the right to consider the suitability of proposed materials in building a residence “does not provide objective standards that could be applied in an even-handed manner ...”).

⁵³ *Seabreak*, 517 A.2d at 270; *see also Abbott v. FD Builders*, 2000 WL 1800137, at *5 (Del. Ch. Nov. 29, 2000); *Point Farms Homeowner’s Ass’n, Inc.*, 1993 WL 257404, at

The Harmony Standard, however, may be permissible if Bayberry Dunes possesses a “sufficiently coherent visual style [to enable] fair and even-handed application,”⁵⁴ and if the Standard provides “a reasoned, non-arbitrary basis for the reviewing authority to assess whether a proposal would disrupt the visual harmony of the affected community.”⁵⁵ This Court has upheld a reviewing authority’s imposition of restrictions under deed restrictions similar to the Harmony Standard where the community has distinctive characteristics of a common scheme, such as a “Key West” architectural style,⁵⁶ or where the proposed building is obviously incongruous with the rest of the common interest community, in a manner that can be objectively assessed and applied.⁵⁷ Here, I find the pleadings are inconclusive as to whether there is a “sufficiently coherent visual style” in Bayberry Dunes, so a

*3. *But see Lawhon*, 2008 WL 5459246, at *8 (“Delaware case law approves of evaluations made with [the harmony and outlook] criteria.”).

⁵⁴ *Lawhon*, 2008 WL 5459246, at *5 (internal quotation marks and citations omitted); *see also Dolan v. Villages of Clearwater Homeowner’s Ass’n, Inc.*, 2005 WL 2810724, at *4 (Del. Ch. Oct. 21, 2005).

⁵⁵ *Dolan*, 2005 WL 2810724, at *4.

⁵⁶ *Id.*

⁵⁷ *Cf. Lawhon*, 2008 WL 5459246, at *4, 8 (the proposed structure had a perpendicular orientation that “would create an incongruous appearance” with the rest of the community, and its color “would be a color unlike the rest – a deep red instead of the earth tones of yellow, clay, white and beige [of the other homes in the community]”); *Serv. Corp. of Westover Hills v. Guzzetta*, 2009 WL 5214876, at *6-7 (Del. Ch. Dec. 22, 2009); *Christine Manor Civic Ass’n v. Gullo*, 2007 WL 3301024, at *2 (Del. Ch. Nov. 2, 2007) (“barn-like” outbuilding so dwarfed any other existing outbuildings that it created a disharmonious appearance); *Point Farm Homeowner’s Ass’n, Inc.*, 1993 WL 257404, at *3.

material question of fact exists whether the Harmony Standard is enforceable, which prevents the granting of the Motion.⁵⁸

In addition, the ARC may evaluate the Plans under the Setback Covenants and the Building Area Covenant. The Setback Covenants and Building Area Covenant provide clear, precise and fixed standards and an objective basis under which the ARC can conduct its review. The Setback Covenants apply to “buildings or structures,” including the Swimming Pool in this instance.⁵⁹ The Building Area Covenant is not implicated here since there is no allegation that construction of the Swimming Pool would cause the Property to violate the Building Area Covenant.⁶⁰

⁵⁸ BBD argues that the Restrictive Covenants are ambiguous and asks the Court to consider extrinsic evidence – specifically the existence of swimming pools in neighboring developments with a similar deed restriction, and a notice circulated by the Board to property owners detailing legal advice regarding deed restrictions. D.I. 17, at 10-12. In analyzing a motion for judgment on the pleadings, a court “may consider, for carefully limited purposes, documents integral to or incorporated into the complaint by reference.” *McMillan v. Intercargo Corp.*, 768 A.2d 492, 500 (Del. Ch. 2000) (holding that the same standard that applies to a Rule 12(b)(6) motion applies to a Rule 12(c) motion); *see also Jimenez v. Palacios*, 250 A.3d 814, 827 (Del. Ch. 2019), *as revised* (Aug. 12, 2019), *aff’d*, 237 A.3d 68 (Del. 2020) (TABLE). Since the extrinsic evidence argued by BBD was not referenced in or integral to the pleadings, I do not consider that evidence for purposes of the Motion.

⁵⁹ *See* D.I. 5, Ex. B, § 13.

⁶⁰ The Plans appear to show that the lot coverage with the Swimming Pool will be within 45%. *Id.*, Ex. F.

D. Did the ARC Apply the Restrictive Covenants Reasonably?

The next issue to address is whether the ARC acted reasonably in issuing the Denial. A deed restriction that conditions “the right to make improvements on the permission of [the ARC] is enforceable but permission must not be withheld unreasonably and the burden is on the [ARC] to show its actions are reasonable.”⁶¹

The Association contends that the ARC reasonably applied the Restrictive Covenants and issued the Denial because (1) the Swimming Pool does not meet the unambiguous Setback Covenants, and (2) the Plans did not provide the specificity required by the Restrictive Covenants.⁶²

BBD counters that the Restrictive Covenants do not address swimming pools and, instead, provide that the setbacks in the Zoning Ordinances control; and the ARC acted unreasonably in rejecting the Swimming Pool due to lack of specificity in the Plans.⁶³ BBD contends that the Restrictive Covenants “essentially incorporate certain provisions of the [Zoning Ordinances]” and, since the Zoning Ordinances specify the rear setback for swimming pools,⁶⁴ the Restrictive Covenants have “cede[d] control of pools and other zoning/land/use

⁶¹ *Dolan v. Villages of Clearwater Homeowner’s Ass’n, Inc.*, 2005 WL 2810724, at *4 (Del. Ch. Oct. 21, 2005).

⁶² D.I. 15, at 8-12; D.I. 18, at 4-6.

⁶³ D.I. 17.

⁶⁴ *Id.*, at 8.

matters” to the Zoning Ordinances.⁶⁵ I disagree. A careful reading of the Restrictive Covenants shows that the Zoning Ordinances govern “building setback lines, building heights, building areas and land use in general” in Bayberry Dunes to the extent those requirements are more restrictive than the requirements in the Restrictive Covenants.⁶⁶ In this Report, I have concluded that the Swimming Pool is a “structure” under the Restrictive Covenants.⁶⁷ Interpreting the plain meaning of Section 2, I compare the 18-foot rear setback line established for “structures” by the Setback Covenants with the six-foot rear setback line for a swimming pool under the Zoning Ordinances. Since the Setback Covenants provide a more restrictive setback requirement than the Zoning Ordinances do, the Setback Covenants control in this instance.

However, from the pleadings, it is unclear whether the ARC assessed the Plans based on the Setback Covenants and/or the specificity requirement during its review. The Denial appears to show that the ARC applied the Harmony Standard in denying the Swimming Pool, since it states that “maintaining the harmony of the community and its serene nature is a priority for our residents,” and that swimming pools “are not consistent with this priority and would create an incremental

⁶⁵ *Id.*, at 9.

⁶⁶ *See* D.I. 5, Ex. B, § 2.

⁶⁷ *See* notes 39-45 *supra* and accompanying text.

negative impact on surrounding neighbors and the community.”⁶⁸ By its plain language, the Denial does not identify either the Setback Covenants or the specificity requirement as a reason supporting the ARC’s disapproval.⁶⁹ However, in July of 2020 communications between the ARC and BBD about the Swimming Pool, the ARC noted that the Swimming Pool did not satisfy the Setback Covenants so BBD’s project “cannot be considered/approved.”⁷⁰ I find that it remains a factual dispute as to whether the ARC considered the Setback Covenants or the specificity requirement in issuing the Denial.

Further, as discussed above, there is not sufficient evidence to show whether the ARC objectively and reasonably applied the Harmony Standard in issuing the Denial. While the Denial cites that “substantial recreational structures” are

⁶⁸ D.I. 5, Ex. G.

⁶⁹ *Id.* The Board subsequently upheld the Denial in a February 23, 2021 email that does not discuss the reasons for the disapproval and affirms that “the ARC acted within the scope of its authority in denying the request for the pool.” *Id.*, Ex. H.

⁷⁰ *Id.*, Ex. D. It is unclear from the documents provided whether the July of 2020 communications between BBD and ARC represented a formal submission to the ARC or an informal discussion prior to the September 7, 2020 submission. *See id.*, Exs. C, F. BBD’s July 14, 2020 email noted that a “rough drawing of the proposed location” was attached and that “[a]dditional specs can be provided as soon as a detailed design and materials are selected.” *Id.*, Ex. C. In its briefing on the Motion, BBD suggests that the September 7, 2020 email was a continuation of the July of 2020 discussions. *See* D.I. 17, at 3-5. The Association contends, in its briefing, that BBD submitted the plan for the Swimming Pool “[i]n August 2021.” D.I. 15, at 4. The Amended Complaint, though, refers to the July of 2020 communications as BBD “advis[ing] the ARC of its plans” to build the Swimming Pool, the ARC’s rejection of BBD’s proposal on July 15, 2020, and BBD’s redesign of the Swimming Pool and submission of “its plan for the pool to the ARC” on September 7, 2020. D.I. 5, ¶¶ 8, 9, 11, 12.

inconsistent with the harmony of the community,⁷¹ factual issues remain whether Bayberry Dunes has a sufficiently coherent visual style that would provide a reasoned, non-arbitrary basis for the ARC to evaluate whether the Swimming Pool would disrupt that visual harmony. Viewing evidence in the light most favorable to the non-moving party, I find, therefore, there are material disputed facts concerning the standards applied by the ARC and whether approval of the Swimming Pool was reasonably withheld.

III. Conclusion

I recommend that the Court DENY the Association's Motion for Judgment on the Pleadings. This is a final report, and exceptions may be taken under Rule 144.

Sincerely,

/s/ Patricia W. Griffin
Master in Chancery

⁷¹ D.I. 5, Ex. G.